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Supreme Court, U.S.
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No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,

Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

Harry M. Ng
Doug W. Morris
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

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Counsel for Amicus Curiae

QUESTION PRESENTED

Whether an antitrust complaint alleging only parallel conduct by defendants along with a conclusory allegation of conspiracy is sufficient to state a claim for treble damages under Section 1 of the Sherman Act, 15 U.S.C. § 1.

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INTEREST OF AMICUS CURIAE[1]

The American Petroleum Institute ("API"), a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question of antitrust law: Whether the mere allegation that competitors have engaged in parallel conduct is sufficient to defeat a motion to dismiss an antitrust claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. Parallel conduct frequently results from independent decisionmaking by competitors pursuing their own economic motivation. Accordingly, parallel conduct does not itself violate the antitrust laws, and evidence of parallel conduct is not by itself sufficient to show an agreement in violation of Section 1 of the Sherman Act. Under the court of appeals' decision in this case, however, antitrust plaintiffs can defeat a motion to dismiss a claim under Section 1 of the Sherman Act, and thus subject the defendants to costly, burdensome, and protracted discovery, by combining allegations of parallel conduct with a conclusory allegation of a conspiracy in restraint of trade. Because API's members may be subjected to such suits, they have a strong interest in the standard that applies in cases alleging that parallel business conduct states an antitrust claim.

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[1] Letters from Petitioner and Respondent indicating consent to file this brief are on file with the Clerk. Pursuant to this Court's Rule 37.6, API states that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than API, make a monetary contribution to the preparation or submission of this brief.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API has participated as *amicus curiae* in other antitrust cases in this Court, including *Texaco, Inc.* v. *Dagher*, 126 S. Ct. 1276 (2006); *Volvo Trucks North America, Inc.* v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006), *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997), and *Texaco, Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented and its significance.

STATEMENT

This case presents an important and recurring question on which the federal courts of appeals are divided: Whether an antitrust plaintiff states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, by alleging that defendants engaged in parallel conduct and that the conduct was the result of a conspiracy.

Respondents are consumers who filed a putative class action alleging that the Petitioner telecommunication companies violated Section 1 of the Sherman Act by conspiring not to compete against one another in their respective geographic markets for local telephone and high-speed Internet services, and to prevent other competitors from entering those markets. Pet. App. 4a-5a.

1. **Respondents' Complaint.** The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, required Petitioners, the former regional Bell operating companies or their successors (known as "incumbent local exchange carriers" or "ILECs"), to open their government-sanctioned and regulated regional monopolies over local telephone service to competition from "competitive local exchange carriers" ("CLECs"). Pet. App. 4a. Respondents allege that Petitioners

conspired to keep CLECs from competing successfully in their respective markets. *Id.* In addition, Respondents allege that Petitioners agreed not to compete in each other's territories. *Id.*

Respondents claim that the conspiracy not to compete is shown by "parallel conduct," in that none of the Petitioners has attempted to enter another's market. According to Respondents, this failure would be "anomalous" absent an agreement not to compete. *Id.* at 5a. Some areas served by one ILEC are surrounded mostly or entirely by territory served by another. *Id.* Respondents contend that the surrounding ILEC would have a natural competitive advantage in the surrounded territory. *Id.* Respondents did not allege any facts about the purported noncompetition agreement, other than that Petitioners had the opportunity to conspire and the ability to keep the conspiracy secret. *See Id.*[2]

Respondents also contend that Petitioners agreed to prevent CLECs from competing successfully in their respective territories by employing various tactics designed to thwart the competition contemplated by the Telecommunications Act. *Id.* at 7a. Though each ILEC is naturally motivated to protect its own territory, Respondents contend that Petitioners "share a common motivation" to keep CLECs from competing in *any*

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[2] Respondents alleged that two Congressmen wrote to the Department of Justice to complain about Petitioners' "very apparent non-competition policy," and that one executive stated in an interview that an ILEC might "turn a quick dollar" by competing in another's territory but "that doesn't make it right." Pet. App. 6a. Neither of these allegations supports an inference that there was an agreement among the Petitioners. The former is an observation of the same parallel conduct alleged by Respondents, while the latter supports an inference of self-interested conduct at least as strongly as an inference of conspiracy.

territory. According to Respondents, if one ILEC allowed a CLEC to compete, it would demonstrate that such competition can be successful, and the successful CLEC might then pose a threat in other ILECs' territories. *Id.* at 7a-8a. As with the purported agreement not to compete, Respondents did not allege any factual premise for their allegation of a conspiracy to exclude CLECs.

2. The District Court's Decision. The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Pet. App. 36a. The district court held that allegations of "conscious parallelism," or parallel behavior by competitors, are not sufficient to prove an agreement in violation of Section 1, and therefore not sufficient to survive a motion to dismiss.

The district court held that "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions." *Id.* at 41a. "[A]llowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted." *Id.* at 44a.

The court examined the allegations of the complaint and concluded that they were not sufficient to support an inference that Petitioners were acting pursuant to a mutual agreement rather than their own self-interest. With regard to the alleged agreement not to compete, the court noted that expansion into another ILEC's territory would require Petitioners to enter an entirely new business as a CLEC, and that the market power in an ILEC's home territory would not transfer to an adjacent territory where another company controls the infrastructure. *Id.* at 53a-54a. With regard to Respondent's claim that Petitioners conspired to exclude CLECs, the court reasoned that each ILEC was motivated

to protect its own territory, and would expect the others to be similarly motivated, so there was no basis to infer the conduct "was the result of anything but their individual economic interests." *Id.* at 50a. Because Respondents' allegations did not support an inference that Petitioners' parallel conduct indicated that they had entered into any agreement, the district court found that the complaint did not adequately allege that Petitioners violated Section 1 of the Sherman Act. *Id.* at 58a.

3. The Second Circuit's Opinion. The court of appeals reversed. The court did not take issue with the district court's conclusion that the allegations of the complaint are not sufficient to support a finding that Petitioners entered into an agreement in violation of the Sherman Act, even if all factual allegations are accepted as true and all permissible inferences are drawn in favor of Respondents. Instead, the court of appeals held that the district court "applied an incorrect standard for evaluating the defendants' motion to dismiss." Pet. App. 10a-11a. The court of appeals held that a complaint should survive a motion to dismiss if conspiracy is "among the realm of plausible possibilities," and that allegations of parallel conduct satisfy this "modest" standard. *Id.* at 19a, 22a.

The court of appeals acknowledged that district courts have reached contrary results based on "a well-founded concern that to do otherwise would be to condemn defendants to potentially limitless 'fishing expeditions'—discovery pursued just 'in case anything turns up'—in hopes, perhaps, of a favorable settlement in any event." *Id.* at 27a (notes omitted). The court of appeals stated that it was "not unsympathetic to these concerns," and observed "that a balance is being struck here, that on one side of the balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless

claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 28a, 30a. The court of appeals stated that, "[i]f that balance is to be recalibrated, however, it is Congress or the Supreme Court that must do so." *Id.* at 30a.

SUMMARY OF ARGUMENT

To prevail on a claim under Section 1 of the Sherman Antitrust Act, a plaintiff must prove the existence of a conspiracy. The conspiracy can be proved by direct or circumstantial evidence, but the range of inferences available from circumstantial evidence is limited. Conduct that is as consistent with innocent activity as with conspiracy does not support an inference of conspiracy.

Circumstantial evidence that companies have engaged in parallel behavior is at least as consistent with independent decisionmaking as it is with illegal collusion. Competitors in the same market facing the same competitive pressures often rationally and independently come to the same conclusions as to the most advantageous course of action. This Court and the courts of appeals thus agree that standing alone, proof of parallel behavior is not sufficient to prevail on a Sherman Act Section 1 claim. Instead, the courts require that plaintiffs show the existence of some "plus factors" beyond mere parallel conduct that tend to exclude the possibility of independent behavior. Moreover, conclusory allegations of "conspiracy" are insufficient, standing alone, to constitute a cause of action under the antitrust laws.

The district court correctly dismissed the claim in this case, holding that allegations of parallel conduct combined with a conclusory allegation that defendants conspired do not state a claim upon which relief may be

granted. The Second Circuit, however, reversed the district court, holding that so long as conspiracy was among the realm of plausible possibilities, Respondents' allegations of parallel conduct were sufficient to survive a motion to dismiss. This holding directly conflicts with that of the Tenth Circuit, and diverges from opinions of three other courts of appeals, which have held that bare allegations of antitrust conspiracy are insufficient to survive a motion to dismiss. Two additional circuits, meanwhile, have held in accord with the Second, further evincing the split in this case.

The Second Circuit's contrary decision allows meritless antitrust claims to proceed to costly and protracted discovery. As the court itself recognized, this standard will allow unscrupulous plaintiffs to engage in limitless fishing expeditions, and encourages defendants to settle unmeritorious claims to avoid colossal discovery expenses. Rule 12(b)(6) was intended to avoid exactly this situation.

ARGUMENT

I. The Court of Appeals Has Decided An Important Question In A Way That Conflicts With Decisions Of Other Courts Of Appeals And This Court.

A plaintiff alleging a violation of Section 1 of the Sherman Act must prove the existence of a "contract, combination . . . or conspiracy in restraint of trade." 15 U.S.C. § 1; *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911). Proof of an agreement in restraint of trade requires "evidence that tends to exclude the possibility of independent action by the [defendants]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

When an antitrust plaintiff relies on circumstantial evidence to show the existence of an agreement, "antitrust law limits the range of permissible inferences" that may be drawn from such evidence. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* The plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (internal citation omitted).

One type of circumstantial evidence often proffered by antitrust plaintiffs is evidence of a pattern of uniform business conduct by competitors, or "conscious parallelism." Such parallel conduct, however, quite often results from independent decisionmaking by competitors rather than agreement among competitors. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999) ("[I]f a firm's motivation is merely to meet rival prices, it would constitute only interdependence. Accordingly, to prove conspiracy, evidence of action that is against self-interest or motivated by profit must go beyond mere interdependence."); *Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 368 (8th Cir. 1949) ("Each is forced by the situation itself to take into account the policy of his rival in determining his own [price], and this can not be construed as a 'tacit agreement' between the two."). Consequently, this Court has recognized that "conscious parallelism," by itself, is not sufficient to show an antitrust conspiracy. *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *see also Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("[C]onscious parallelism" is "not in itself unlawful.").

The courts of appeals have followed this Court in holding that "the Sherman Act does not proscribe"

conscious parallelism. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359-360 (3d Cir. 2004); *see also, e.g.*, *City of Tuscaloosa* v. *Harcros Chems., Inc.*, 158 F.3d 548, 570 (11th Cir. 1998) ("It is well settled in this circuit that evidence of conscious parallelism alone does not permit an inference of conspiracy unless the plaintiff either establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest." (brackets and marks omitted)); *Market Force Inc.* v. *Wauwatosa Realty Co.*, 906 F.2d 1167, 1172 (7th Cir. 1990) ("[C]onscious parallelism by itself is not enough to support an antitrust conspiracy case."); VI Areeda, Antitrust Law ¶ 1434, at 241 (2d Ed. 2003) ("With rare exceptions, the courts have been very clear that mere parallelism, including interdependent conscious parallelism, cannot support a conspiracy finding unless there are additional or 'plus' factors.").

Because "conscious parallelism" often results from independent decisions by competitors, proof of an agreement in restraint of trade requires evidence of other facts and circumstances – often called "plus factors" – that tend to exclude the possibility that the alleged conspirators acted independently. *E.g.*, *Blomkest Fertilizer, Inc.* v. *Potash Corp. of Sask., Inc.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc) ("An agreement is properly inferred from conscious parallelism only when certain 'plus factors' exist."); *Lazy Oil Co.* v. *Witco Corp.*, 166 F.3d 581, 588 n.11 (3d Cir. 1999) (Where "there is no direct evidence of a price-fixing conspiracy, . . . [plaintiffs] must present evidence both of conscious parallelism and of 'plus factors' to make out a price-fixing case.")

While the courts of appeals uniformly require an antitrust plaintiff alleging parallel conduct as the basis for a conspiracy to show the existence of "plus factors" in order to survive a motion for summary judgment, the courts have split over whether such a plaintiff must make more than a conclusory allegation of conspiracy at the

pleadings stage. In this case, the Second Circuit held that an allegation of parallel conduct is sufficient. Pet. App. 25a. Other circuits have come to contrary conclusions.

The Tenth Circuit held, in *Cayman Exploration Corp.* v. *United Gas Pipe Line Co.*, that a plaintiff alleging conscious parallel behavior, without more, does not state a claim under the antitrust laws. 873 F.2d 1357, 1361 (10th Cir. 1989). In *Cayman*, the plaintiff had alleged a horizontal price fixing conspiracy in a market for natural gas transmission. *Id.* As in this case, the plaintiff in *Cayman* "failed to allege *any* facts which would support an inference that the alleged actions by [defendants] would be contrary to their economic interests absent an agreement." *Id.* (emphasis in original). The Tenth Circuit therefore held that the antitrust claim was properly dismissed for failure to state a claim upon which relief may be granted. *Id.* Quoting the Fifth Circuit's opinion in *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), the court held, "The antitrust plaintiff who relies on a theory of 'conscious parallelism' must establish that 'defendants engaged in consciously parallel action . . . which was contrary to their economic self-interest so as not to amount to good faith business judgment.'" 873 F.2d at 1362.

The Second Circuit's opinion also diverges from decisions of two additional circuits. The First Circuit has held that an antitrust complaint may be dismissed where it fails to give a sufficient factual predicate to support the allegation of conspiracy. *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999). In that case, the court held that "the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *Id.* Similarly, the Eighth Circuit has held that a Section 1

claim survives a motion to dismiss only if it alleges, at least minimally, "facts constituting the conspiracy, its object and accomplishment." *Baxley-DeLamar Monuments, Inc.* v. *American Cemetery Ass'n*, 843 F.2d 1154, 1156 (8th Cir. 1988).[3]

The circuit split presented in this case is even more pronounced because two circuits have held, in line with the Second Circuit here, that an allegation of parallel conduct without further allegations of "plus factors" is sufficient to withstand a motion to dismiss. *Lum* v. *Bank of America*, 361 F.3d 217, 230 (3d Cir. 2004) ("[P]laintiff need not allege the existence of these plus factors in order to plead an antitrust cause of action."); *Dillard* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1159 (5th Cir. 1992) (holding conscious parallelism sufficient to withstand a motion to dismiss where plaintiff alleged opportunity to conspire). The Second Circuit's opinion thus conflicts or is in sharp tension with three other courts of appeals, and agrees with two.

* * *

The complaint in this case alleged that Petitioners engaged in parallel behavior by resisting the entry of CLECs into their own geographic markets and by failing to enter one another's geographic markets. As the district court explained, the parallel behavior alleged is at least

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[3] District courts also regularly dismiss claims of antitrust conspiracy for failing to allege facts constituting the conspiracy. *E.g.*, *In re Milk Prods. Antitrust Litig.*, 84 F. Supp. 2d 1016, 1020 (D. Minn. 1997) ("[G]eneral allegations of a conspiracy will not suffice; the claim must include a statement of the facts constituting the conspiracy, its object and accomplishment."); *Broyles* v. *Wilson*, 812 F. Supp. 651, 655 (M.D. La. 1993) ("[N]o facts are alleged which, if proved, would establish that [defendants] are part of any conspiracy.").

as consistent with independent action as with collusion. Although the complaint also included a conclusory allegation that the defendants agreed to restrain trade in violation of Section 1, it did not make any factual allegations that, if accepted as true, would support a finding of liability under Section 1.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), will be granted if the allegations of the complaint, and all reasonable inferences therefrom, will not support a finding of liability. *E.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 283 (1986); *York* v. *Ass'n of the Bar*, 286 F.3d 122, 125 (2d Cir. 2002); *Maio* v. *Aetna, Inc.*, 221 F.3d 472, 481-82 (3d Cir. 2000). "[A] general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action." *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 663 (8th Cir, 1962) (Blackmun, J.); *see also Abbott Labs.* v. *Brennan*, 952 F.2d 1346, 1355 (Fed. Cir. 1991) ("Allegations of legal conclusions are insufficient to withstand a motion to dismiss."). Under that basic rule, the district court correctly dismissed the complaint in this case, and the Second Circuit was incorrect to hold that a conclusory allegation of conspiracy transforms a claim of parallel conduct into a claim upon which treble damages may be granted under the Sherman Act.

II. The Practical Effect Of The Court Of Appeals' Decision Is To Prevent The Dismissal Of Meritless Antitrust Claims Prior To Discovery.

Discovery in civil antitrust cases is often extremely burdensome and expensive, frequently running into millions of dollars and consuming many months or even years. *See DM Research*, 170 F.3d at 55 (describing antitrust discovery as "costly and burdensome"); *Asahi Glass Co., Ltd.* v. *Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by

designation) (antitrust discovery is "inevitably costly and protracted"). Discovery may extend to scores or even hundreds of individuals and millions of documents.

Because a prevailing defendant generally cannot recover its litigating costs from the plaintiff, defendants may settle even meritless antitrust cases for significant sums in order to avoid costly and burdensome discovery. As the Second Circuit recognized, an undemanding pleading standard may encourage plaintiffs to bring meritless claims and then use the threat of expensive discovery as leverage to obtain a settlement. "[T]he statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978).

Under the Second Circuit's standard, would-be plaintiffs need only observe parallel behavior among competitors in any market in order to bring suit, an observation that will exist in almost any market at some point. If such a plaintiff recites the parallel conduct and adds a bare assertion that it is due to "conspiracy," he will escape dismissal of the complaint and subject defendants to the choice of expensive discovery or settlement.

Rule 12(b)(6) is designed, in part, to prevent precisely this situation. *Rutman Wine Co.* v. *E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("The purpose of F.R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.") There is no reason why it should not play this function in antitrust cases. "When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to providing antitrust litigation

with an exemption from Rule 12(b)(6)." *Car Carriers* v. *Ford Motor Co.*, 745 F.2d 1101, 1106-1107 (7th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Harry M. Ng
Doug W. Morris
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

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